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NOFORN

*Some legal aspects of
the AZORIAN program*

AT SEA WITH THE LAW

(b)(3)(c)

In today's world of oversight, managers of technical collection programs must be closely attuned to the legal implications of their actions. Nothing may be more certain than death and taxes, and taxes did, indeed, become a part of the AZORIAN program (the project designed to retrieve the wreckage of the Soviet Golf-II submarine #772.)* But other legalities are almost as certain to arise in any major technical collection effort. This is doubly true if the effort is wrapped in a commercial disguise. Even if AZORIAN were to become an example of a type of activity never again to be carried out by CIA, there are legal lessons to be learned from it. These lessons may be only dimly visible to present-day managers. This article attempts to illuminate some of the problems faced in the AZORIAN program in the hope that new and elegant approaches can be made to working within the ever-present legal boundaries. Examples to be described (from a non-lawyer's perspective) are from the realm of international law, taxes, patents and the Freedom of Information Act.

Forebodings

The contracting officer assigned to [] the group responsible for AZORIAN, was the first to warn those of us working the technical problems that we were heading into a confused legal sea. The Director of Central Intelligence had delegated his contracting authority for AZORIAN directly to [] (b)(3)(c) [] experience had included duty as a naval officer, a Foreign Service Officer and contracting officer for both covert and national programs. In examining the contracting job facing him, [] soon became aware that CIA had essentially zero experience in the covert procurement and operation of a commercial sea-going vessel. He suggested that [] could find itself setting precedents in admiralty law by conducting intelligence operations with an ostensibly commercial ship. For the massive facade being established there were no clear-cut rules to follow with regard to such matters as the International Law of the Sea, taxes, insurance, and the special rights given by the Jones Act to American merchant seamen sailing on U.S. flag vessels. The message [] brought to [] was that these issues had to be addressed along with the technical problems to assure the project's success. He was dead right.

Salvage Rights

The basic legal issue that required study was the salvage of sunken foreign warships within international law. There was high political impact in the recovery of a

* For earlier articles on the AZORIAN program, see *Studies in Intelligence* Volume XXII No. 3, Fall 1978, and Volume XXIII No. 2, Summer 1979.

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foreign warship, in this case, the Golf-II submarine that had not been officially abandoned by the Soviet Union. Initially, CIA's Office of General Counsel was asked for an advisory opinion; it was their belief that a recovery attempt would not be an illegal act in terms of international law. The Agency then turned to the Office of the Judge Advocate General in the Department of the Navy for a second opinion. The Navy, logically, had more direct experience in a matter of this kind.

In the world of commerce, the Navy pointed out, salvage is an act done voluntarily—there is no legal obligation—to remove property from an impending peril at sea. After performing the service a claim can be made only if the following three elements were present: 1) a marine peril; 2) service voluntarily rendered when not required as an existing duty or from a special contract; and 3) success in whole or in part, or that the service rendered contributed to such success. The 1910 Brussels Convention on Assistance and Salvage at Sea excludes warships and public vessels in public service from making claims. Since the United States was a signatory to this convention, a U.S. Government-owned vessel would be excluded from making a claim against another signatory. It was clear to the AZORIAN team that the general law of salvage would not furnish any legal guidance since none of its provisions pertained to the retrieval of the Golf-II submarine. There was, however, a very compelling precedent that bounded the operation.

Ships of war are recognized as possessing the rights of sovereignty of the parent country. The tenets of international law, which are recognized by the United States, have maintained the position that the title to sunken warships remains with the flag government unless a specific notification of the intent to abandon has been made. As the report of the Navy Judge Advocate General noted:*

Abandonment cannot be implied from the absence of any interest overtly shown by the flag nation in locating the wreck. It makes no difference whether the sunken warship is located in the high seas or in the territorial waters of a foreign country. If the wreck constitutes a hazard to navigation, the flag nation must be consulted as to salvage. The flag nation has a right to determine what documents, classified material, etc., should be handed over in the event the vessel is salvaged or removed because it constitutes a hazard.

It should be mentioned that the study done by the Navy Judge Advocate General was an unclassified one. Removal of a hazard was the only logical reason that the Judge Advocate General could overtly assume as the basis for the requested study. The fact that the Golf-II wreckage was not a navigational hazard does not alter the arguments about abandonment or rights of sovereignty.

The United States had made its position very clear on these issues. It had denied the rights of salvage of the USS *Peary* to the Australian Government. The *Peary* had sunk in Darwin Harbor in World War II. The Navy had removed its name from the naval vessel register and stated it no longer had interest in it. Still it was determined that the United States had title to the vessel and had made no expressed abandonment of it. The United States denied salvage on the ground that the U.S. Navy preferred that the wreck remain undisturbed as a place of rest for the gallant men who went down with it.

In a converse case, the United States has recognized the rights of the German Government to the title of German submarines that were sunk in our territorial waters. We have not claimed them as war booty. Furthermore, unless the German

* Department of the Navy, Office of the Judge Advocate General, Memorandum for the File JAG: 10: JRB: lgc 21 August 1970.

Government expressly abandons title to its sunken submarines, the U.S. Government insists there is no authority to salvage them without permission of that government.

The conclusion of the Judge Advocate General study was that the title to the sunken Golf-II submarine and its contents remained with the Soviet Union. Thus, the wreckage was not legally salvageable according to international law. This point, however, was moot because of something the Soviets themselves had done. In 1928 the Soviet Union had raised a British L-class submarine which had gone down in the Baltic Sea in 1919. The Russians rehabilitated the British submarine and put it into service as their *Leninetz* class. Through this act, the Soviet Union left themselves no maneuvering room in which they could claim the United States was violating international law by salvaging their submarine.

There is an interesting story connected to this British L-55 submarine. After the Russians put her into service on 9 October 1931, she was sunk again the very same month in a collision with a merchant ship. Once more she was raised and put into service by the persistent Soviets, who thereafter restricted her to training exercises only.

The January 1979 issue of the *U.S. Naval Institute Proceedings* contained an article entitled "The Recovered Sunken Warship: Raising a Legal Question," written by a member of the Judge Advocate General's Corps, U.S. Navy. The author, Lt. R. D. Wiegley, examined the general Soviet-American problem of the recovery of each other's sunken warships using AZORIAN (the author, who was not involved with the project, referred to it as Project JENNIFER because his information was based on open sources) as a specific example. He concluded that the legality issue was arguable, and he presented arguments on both sides. His preference was a third option which would brand covert intelligence operations neither legal nor illegal. Instead they would be considered to be in a "gray area." The United States and the Soviet Union would enter into a formal agreement on the recovery of sunken military ships. In this way the two superpowers would avoid causing a serious international incident over the recovery of the other's lost vessels. Certainly for the foreseeable future the recovery of sunken warships will remain a contentious issue.

And Who Shall Pay the Taxes?

It was recognized early in the AZORIAN program that the question of tax payments was going to be a problem. The ultimate magnitude of the problem, however, was not perceived. Eventually, the tax question was to result in publicity to AZORIAN and force the only and very limited public admission by the U.S. Government that the CIA was involved with the *Hughes Glomar Explorer*. In the early days, the discussions focused only on the basic question of how much, if any, tax should be paid.

There was no question that as part of a government operation the physical assets acquired in AZORIAN should not be subject to taxation by the state and local governments. But there was a dilemma. Millions of dollars would be saved by not paying all the taxes on the *Explorer* and its associated barge; however, tax avoidance could expose the government interest in the program. A decision was made in the beginning not to clear and brief all the cognizant taxing authorities in order to get their approval of the non-payment of taxes. To help preserve the commercial facade, however, some taxes were paid on items like spares and consumables for the ship and the *ad valorem* tax on the barge. The first serious examination of the tax issue began in the fall of 1971.

The initial hardware item chosen for a complete tax study was the steel pipe which was to be used as the lifting mechanism for the target submarine. Since it was to be procured openly, it had the cover name of deep ocean mining pipe. The study was done by counsel for the Texas-based Hughes Tool Company, the prime contractor for the pipe string. Counsel examined the applicability of the Texas Limited Sales, Excise and Use Tax Act to the purchase by Hughes of deep ocean mining pipe.

(b)(1) contracted to manufacture at its (b)(1) plant or to have manufactured by the Earle M. Jorgenson Company at its plant in (b)(1) the specified semi-finished and finished heavy-walled pipe for delivery to Hughes Tool Company at its plant in Houston, Texas. After taking delivery of the pipe, Hughes Tool performed certain completion work including threading pipe ends, treating and coating pipe, and performing tensile load proof-testing of the pipe at Houston. Afterwards, small quantities of the pipe were to be shipped by common carrier to Chester, Pa., and there loaded on the ship being constructed by Sun Shipbuilding and Dry Dock Company under contract for Global Marine, Inc. (GMI), a California company. Upon completion of construction, the ship was to be registered in the name of GMI but equitably owned by Hughes Tool Company. After loading on the ship, the pipe was to be used in mining operations performed exclusively outside the limits of any state in the United States.

It was the opinion of counsel that the sale of pipe (b)(1) to Hughes Tool was not subject to the sales tax laws of the states of (b)(1) because of the interstate commerce exemptions under the (b)(1) sales tax statutes. These exemptions excluded from the sales tax the receipts from sales of personal property which, pursuant to the contract of sale, was required to be shipped to a point outside of either state by the seller. For the most part, sales taxes on all major items were either exempt or explained as delivered to the ostensible sponsor out-of-state and/or in international waters.

Although the Texas Sales and Use Tax exemptions appeared to be applicable to the deep ocean mining pipe, the Hughes Tool Company counsel recommended, as a safety measure, a conference with the Office of the Comptroller of Public Accounts for Texas. This office was responsible for the collection of the Texas sales tax. The Comptroller ruled favorably and the tax exemptions were applied to the pipe.

At Headquarters (b)(1) (b)(1) was initially involved in not only the tax matters, but all aspects of the cover operations), established an AZORIAN Cover Advisory Committee. This group formed a special subcommittee for the tax problem. The chairman of this committee contacted the four major contractors, Honeywell, Lockheed, Hughes Tool and GMI, about state sales and use taxes. Their view was that there would be no major unprogrammed taxes. To be sure all was well in this sensitive cover area, GMI and Hughes Tool obtained additional legal advice in both Pennsylvania (b)(1) These two states, in addition to Texas and California, were the sources of the program's major assets. With legal expertise coming from the four states, the program sailed ahead without running afoul of any tax problems. That is, until it collided with the tax assessor of Los Angeles County in early 1975.

The collision was over a year in coming. Once it occurred, it required over three years to resolve and involved both a lawsuit and an admission by the U.S. Government that it was the owner of the *Hughes Glomar Explorer*. To adequately explain this case, one has to begin with the visits to the Office of the Attorney General, State of California.

Agency representatives met with the California Attorney General in August 1973 and then with two of his tax experts on 9 October 1973. They were given a briefing on all the program details except the target object and asked for their guidance on the tax situation. In brief, the California tax experts recommended that we head off the tax assessment rather than waiting to handle it after it had been made. They pointed out that tax assessors are aggressive by nature, preferring to assess and collect the tax before allowing arguments about whether it was due. Two members of the California State Board of Equalization were identified to the Agency representatives as people who could help head off the assessments, and on 7 November 1973 they were given the same program briefing given the Attorney General and his experts. General agreement was reached that the best way to avoid the California tax was to have GMI turn over title to the ship to the Summa Corporation (the new Hughes organization which was replacing Hughes Tool Company as the ostensible sponsor) at a ceremony at sea outside California territorial limits. This was done on 21 June 1974 as the *Explorer* was departing for the recovery mission.

A review of the documentation relating to the legal status of the *Hughes Glomar Explorer* revealed some weak points with regard to who held title to the ship during the testing program. One more meeting was held on 27 August 1974 with representatives from the California State Board of Equalization along with the principal auditor from the Los Angeles region, and on their advice we modified the documentation to conform to California sales tax exclusions.

(b)(1) Everything now appeared to be in order on the tax front. This lasted until a ruling was issued in another case by the California Supreme Court in December 1974, [redacted]

(b)(3)(n) [redacted] This ruling substantially weakened the "home port doctrine" used by ship owners to resist the *ad valorem* property tax assessed on California property owners every year on 1 March. Because California ship owners routinely registered their ships in out-of-state ports to avoid this tax, the *Explorer* was registered in Wilmington, Delaware, and thus was exempt under the home port doctrine. As an additional precaution in 1974, the ship had been taken outside California territorial waters on 1 March. For these reasons, Summa Corporation, as the ostensible owner, did not pay the *ad valorem* tax on the ship in 1974. But after the December ruling by the State's Supreme Court weakened this doctrine, the legal experts feared that the local tax authorities would claim the *Explorer* was subject to taxation and ask for 1974 as well as 1975 taxes.

The fact that the *Explorer* was to be classified by the Coast Guard as an oceanographic research vessel was legal reason to believe the tax rate should be one percent rather than the 25 percent levied on commercial vessels. The lawyers, however, cautioned that the research classification did not preempt the tax authorities from deciding for themselves what the rate should be. For example, they could assert the right to explore the nature of the research and obtain evidence on it prior to the rate determination.

With these thoughts in mind it was decided that the only proper action would be to approach the Los Angeles County tax assessor privately and tell him that the U.S. Government owned the ship. In this way it was thought that the tax avoidance issue could be resolved quietly and in the government's favor.

The meeting with the tax assessor, Philip Watson, took place on 31 January 1975. In attendance were two Agency representatives and two lawyers, one each from Summa and GMI. *Bona fides* were established by an FBI agent from the Los Angeles field office and through a prior phone conversation between the tax assessor and a cleared member of the State Board of Equalization. Further guarantees were offered

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to the assessor by stating that he could check it out with State's Attorney General (he was a neighbor of the assessor). After these preliminary discussions, the assessor was briefed on the U.S. Government ownership of the *Explorer*, the various contractor relationships, on the reclassification process then in progress to have the ship classed as an oceanographic research vessel, the work done on the ship while in port, the function of the barge and its use in Los Angeles County, and finally the fact that the ship would be in port on 1 March 1975.

The assessor was assured that it was the government's aim to avoid embarrassment to tax authorities. To do this and yet retain the commercial facade, he was told that agreement had been reached with other tax authorities, who were informed on the project, that the government would pay some taxes. Also it would continue the work to reclassify the *Explorer* as an oceanographic research vessel in order to qualify for a lower tax rate if that would protect him from criticism.

The assessor was persuaded that the ship really belonged to the U.S. Government and said he would be satisfied with a letter from GMI's lawyer to this effect. Told that even this much documentation posed too great a security risk, he suggested that the group take the position that the *Explorer* was only temporarily in Long Beach for repairs and that no tax was due on the ship or its equipment; in effect, he advised them to let him handle the tax problem. He waved aside the group's concern that this approach might catch him up or embarrass him; he did not consider that likely. He doubted that simply classifying the ship as a research vessel would take care of the problem, but agreed to keep that option open in case his own approach ran into problems. He was indifferent to the government sponsor's willingness to pay some tax if necessary to protect the deep ocean mining cover; his position remained that no tax at all should be paid. The possibility of questions being asked and his methods of handling them to preserve the program's cover and security were brought up, and he gave complete assurance that he could handle his end.

The meeting concluded with the tax assessor signing a security agreement which prohibited him from making any disclosure of the classified information that he had received. The government group left the meeting feeling that their purpose had been achieved and there was no misunderstanding. They would have done well to consider more deeply the situation of a locally elected official and his likely behavior under extraordinary public pressure.

Shortly after Jack Anderson broke the story of the *Glomar Explorer* to the public in March 1975, the Los Angeles County tax assessor, Mr. Watson, called a press conference to explain his role in the affair. It is worth quoting at length the *Los Angeles Times* story of 3 April 1975 on the press conference:

Assessor Philip E. Watson disclosed Wednesday that four CIA men pleaded with him in January to conceal the true purpose of two Howard Hughes vessels which recovered part of a sunken Soviet submarine in the North Pacific.

"I had heard of the *Glomar Explorer* when it was being refitted at the berth next to the hangar of the Hughes flying boat (the Spruce Goose) at Long Beach. It reportedly cost \$40M and I thought it was a mining boat. . . . These men told me it would be used for undersea detection of Polaris-type submarine missiles and other Russian ship and aircraft movement. . . . They were afraid if the true cost of the boat was listed that perhaps \$300M would excite suspicion somewhere. . . . Somebody is going to pay—who in hell owns a \$300M boat?"

In a cloak-and-dagger description of his contact with the four CIA men, Watson said his help was sought in a complete cover-up of the two-vessel project

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reportedly totalling \$400M or \$450M. On a CIA assurance that the U.S. Government is the true owner of the *Glomar Explorer* and the barge, HMB-1, based at Redwood City, Watson signed a secrecy form in quadruplicate and kept the *Glomar Explorer* off the Los Angeles County tax roll (the reason being that Federal property is not taxable).

However, he (Watson) warned that he may reverse his position if the Hughes Summa Corporation does not formally identify the 618-foot-long *Glomar Explorer* as government-owned when it files its annual declaration of business property in May '75.

If Hughes or his Summa Corporation owns it as private property, the property tax will run about \$9M annually based on the market value appraisal of \$300M for this vessel.

(Watson) showed a lump of black manganese which the *Glomar Explorer* had sucked off the ocean floor at a depth of 17,000 feet. "They gave me this as an introduction when they walked into my office. . . . I had gotten a call from a man identifying himself as a special agent of the FBI (who said) "Four people from Washington have to see you." . . . Watson asked, "What about?" The agent said, "I can't tell you on the phone but if you have any questions" . . . and he gave Watson the name of an attorney who works for the State government in Sacramento. Watson continued, "I called the attorney and he said he couldn't tell me anything over the phone but urged me to meet the four gentlemen."

Watson then telephoned the Los Angeles FBI office and invited the men to his office. (When the group arrived at Watson's office) "the FBI agent first asked if I had any recording devices" . . . "Not unless you brought them" was Watson's reply. The FBI agent then introduced the four men and said "These gentlemen are from the CIA." One from Washington had no business card to offer—the other three gave Watson their regular business cards indicating they must divide their time with the CIA. One, a Los Angeles attorney, is a friend of Watson. Another is a Houston attorney and the other is with the Summa Corporation. They informed Watson that title to the *Glomar Explorer* and HMB-1, also described as a submarine tractor, is with the U.S. Government. They were built under a secret contract with the billionaire Hughes. The barge was manufactured by the Lockheed Missile & Space facility of Redwood City. The *Glomar Explorer* was built by the Sun Shipbuilding and Dry Dock Company at Chester, Pa.

Watson showed a handbill describing launching of the *Glomar Explorer*, 4 November '72, as a deep ocean mining vessel being built for Hughes. The public was invited then to a family day with balloons for children. Watson said, "As long as the Soviet submarine cover-up continued, the *Glomar Explorer* was the scene of parties both in the East and at Long Beach. Some were almost of 'Pearl (sic) Mesta' proportions."

The assessor said he was surprised when the four CIA men insisted he sign the standard government secrecy pledge because he has held a full secrecy rating since he himself worked at Lockheed years ago. "But they argued this was of higher or highest secrecy of some kind so I signed again," Watson continued. "They said Hughes had no investment in either the boat or the barge. The barge was assessed first in 1974 in San Mateo County. The ship was registered in Delaware. The Summa Corporation wrote us 29 March 1974 that it was brought to California to complete construction. It was on sea trial on the lien date, 1 March 1974, so our people agreed it did not have tax status here at that time." Watson said the CIA men attempted to persuade him to assess the ship at one

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percent of its fair market value instead of the usual 25 percent. The one percent appraisal is permissible for fishing boats and oceanographic vessels. Watson refused to make a one percent listing and pointed out that either a one percent or 25 percent listing would have to be accompanied by a specific record of the true market value of around \$300M.

He demanded a letter saying the vessel is the property of the U.S. Government but the CIA men balked. Watson went on, "I told them I would seal it and keep it in our safe. . . . We have some secret contracts on government work and on public officials which may be critical. Years ago we had queries about Richard Nixon—before he was President—as to whether he had filed for his veteran's exemption. He had, and we put that in the safe."

The CIA men refused to yield and Watson now must wait until Summa files its declaration next month (May). If Summa, or Hughes, is then listed as the owner, a \$9M tax bill will follow. If the government is the owner there will be no tax. Watson concluded, "This project was a cover-up for mining. They had agreements with American Smelting & Refining to process the ore. They didn't mention any submarine. They had this other story—that the task was related to detecting movements of submarines. I told my own council and the chief of that division—but not the whole story. I had just seen 'The Sting' and I was suspicious. I asked who will own the boat when this is all over and they said the U.S. will own it."

(b)(1)
(b)(3)(n)
(b)(3)(c)

This news article portrays a classic case of how the interpretation of a meeting depends upon one's perspective and motives.

The tax bill facing the program was between \$11-12 million. It was comprised of the property tax on the ship (Los Angeles County) and the barge (San Mateo County) and all the state sales and use taxes. The latter included the sales tax on modification of the capture vehicle and the ship, plus the use tax on the barge. Heavy pressure after the media exposure was being applied to the several different taxing authorities to explain the tax treatment that they had given to the AZORIAN assets. These officials could no longer hold the line for the Federal Government.

At the state level the officials did put a hold on the tax audit and refused to give information to the press, citing statutes that prohibited divulgence. These same officials, however, told the government that they could no longer accept the cover contracts. At the local level tax bills were issued. Los Angeles County hit Summa with two bills—[redacted] for 1975 and one for [redacted] for 1974. [redacted]

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order to resolve this issue the government had to decide whether to pay the taxes through the contractors and thus preserve the commercial facade or to withhold payment and make public the U.S. Government ownership of the *Hughes Glomar Explorer*.

(b)(1)
(b)(3)(n)

By the end of June 1975 the decision for all intents and purposes, was forced by other events. [redacted] There was little reason now to (b)(1) maintain that the *Glomar Explorer* was a commercial vessel in the face of tax bills that (b)(3)(c) eventually might amount to [redacted] The problem became one of admitting U.S. (b)(3)(n) Government ownership and only that, without further disclosures. Up to this point the government's position had been one of "no comment." Now it was recommended that the following certification in the name of an Agency official be given to the several California jurisdictions involved with the tax issue:

I Certify that the Below Listed Property was Acquired Pursuant to the Terms of a Classified Contract for and in Behalf of the U.S. Government; that it has been used Exclusively for Governmental Purposes; that Title Thereto has been Held for the Convenience and Exclusive Benefit of the U.S. Government; and that Such Property is, in Accordance with Law, Immune from Local or State Taxation:

MV HUGHES GLOMAR EXPLORER

The certification was to be classified, but past experience with Watson had shown there was no guarantee that it would be honored. (b)(1)

(b)(3)(n)

The DCI, William Colby, approved this course of action on 30 June 1975 with the provision that the tax authorities should be provided with a statement that they could make public. It would state that they were in possession of classified information demonstrating that no taxes were due. Mr. Colby also wanted the National Security Council and the Defense Department to approve the course of action. Concurrently, action was under way with the Coast Guard to transfer the title of the ship and the barge to the U.S. Government.

Legal counsel for Los Angeles County decided that the assessment on the ship was valid. They informed the U.S. Government (by this time the Tax Division, Department of Justice, which was representing CIA) that the county was going forward to defend the assessment and collect the taxes due. To force the issue, the tax assessor put a lien on the *Explorer* for back taxes and posted a notice that the ship would be sold at public auction on 27 August 1975. On 18 August he, in effect, seized the ship for non-payment of taxes. The amounts due were:

Taxes	\$4,395,152.43
Penalty 6%	\$ 263,709.14
Seizure Fee	\$ 3.00
Mileage: 25 miles at 70¢ per mile	\$ 17.50
	\$4,658,882.07

The seizure notice was lifted after one day, and the *Explorer* sailed on 20 August for its last time as an Agency vessel. It was at sea for a few days on some final phaseout tasks. (b)(1)

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position with certified documents from the Coast Guard which substantiated the government's ownership. (b)(1)

(b)(3)(n) The petition was accompanied by the corporate and Coast Guard certifications of the government ownership.

Los Angeles County remained firm in its position that the *ad valorem* taxes on the ship were valid. There was no question but that litigation would be required to resolve the issue. The government ownership would have to be made public at trial if the taxes were to be avoided. An agonizing reappraisal was made. The government would enter a civil action against Los Angeles County in the United States District Court for the Central District of California. It would make a very limited admission—"The CIA was involved with the *Hughes Glomar Explorer* for intelligence purposes. The Summa Corporation (and its Hughes Tool Company predecessor) and Global Marine, Incorporated were also involved." Civil Action No. 75-2752-R was entered in late 1975. The case was heard by United States District Judge Manuel L. Real.

On 26 January 1976 Judge Real rendered the following decision:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that

- (1) The United States of America has at all times to the date of this judgment been the actual, real, and beneficial owner of the vessel known as the "HUGHES GLOMAR EXPLORER" and that the Summa Corporation has no rights of ownership to this vessel.
- (2) The two (2) County of Los Angeles *ad valorem* assessments for the years 1974 and 1975 (assessment number H7285-9990450663 and M0753-200547527 respectively), assessing the vessel "HUGHES GLOMAR EXPLORER" to the Summa Corporation on the basis that Summa Corporation was and is the owner of this vessel are illegal, invalid and void.
- (3) The attempted seizure on August 18, 1975 by the County of Los Angeles of the vessel "HUGHES GLOMAR EXPLORER" to collect and satisfy the aforesaid tax assessments is illegal, invalid and void.
- (4) The parties shall bear their own costs.

The decision was appealed by Los Angeles County. During the appeal process all other tax issues were held in abeyance pending the decision of the appeal court. Finally, on 8 January 1979 the U.S. Court of Appeals, 9th Circuit, upheld Judge Real's findings. This action finally should resolve the tax issues that faced the government in AZORIAN.

As of this date (May 1979), however, Los Angeles County had not removed the two tax liens against Summa from their records. Nor has Global Marine Incorporated received a refund from the State Board of Equalization for taxes paid as part of the commercial cover plan. The Tax Division, Department of Justice, is attempting to resolve these issues by letter rather than having the government initiate a show cause hearing before Judge Real.

The experience of AZORIAN clearly indicates the need to examine in detail the tax situation in a technical collection program using a commercial facade for cover. All potential sources of taxation should be uncovered and budgeted for if the commercial cover is to be maintained. Elected officials in state and local government are subjected to tremendous public pressures. It would be unwise to rely on the ability of local and

state officials to protect a commercial cover and at the same time provide the tax benefits or other preferential treatment that might be due a federally funded program.

The \$100,000,000 Brouhaha

You can predict most problems, but not all. No one had anticipated a patent infringement suit against the government over equipment developed and used in the AZORIAN project. Especially, there was no thought of a \$100,000,000 one. But on 16 July 1975 Ocean Science and Engineering, Incorporated (OSE) and Williard N. Bascom filed a "Petition for Infringement of Letters Patent and Breach of Implied Contract" in the United States Court of Claims.

Two months earlier there had been a clue that this might happen. *Science*, a publication of the American Association for the Advancement of Science, had an article in its 16 May issue entitled "Deep-Sea Salvage: Did CIA Use Mohole Techniques to Raise Sub?" The article questioned whether or not CIA had used a recovery scheme based on Bascom's suggestion for a similar mission. In 1962 Bascom had given the Agency a proprietary proposal for the recovery of Soviet nose cones from the ocean floor. Bascom's attorney was quoted as saying that "a review of his rights is being undertaken." The principle patent in question was United States Patent 3,215,976 issued 2 November 1965. Its title was "Method for Surveying and Searching the Ocean Bottom and Recovery of Objects Therefrom."

Actually, when the case was first filed in July, two patents were cited as infringed. This petition was answered by the United States of America (the defendant) on 13 January 1976. The plaintiffs (OSE and Bascom) amended their petition as a result of the discovery process. In this process of examining the evidence provided by the government, the plaintiffs decided that they should dismiss claims for infringement of the second patent, United States Patent 3,472,191. They then filed a "First Amended Petition for Infringement of Letters Patent and Breach of Implied Contract" on 16 July 1976. The government answered this petition on 16 August 1976. Meanwhile, examination of the evidence continued.

A critical decision that had been made initially allowed the discovery process to take place. To be able to defend itself adequately, the government had to use material that was extremely sensitive and highly classified. It included the exact location of the Soviet submarine, details on how it was located and retrieved, methods used on and data from (b)(1) contractors involved in the project. (b)(3)(n) Eventually, CIA personnel, who were under cover, would have to testify, and CIA organizational information would be revealed. All this material would have to be made available to the plaintiffs in the pre-trial discovery process. A decision had to be made—should the government go all out and defend itself against what it felt were groundless charges or should it seek a compromise out-of-court settlement with the plaintiff, thereby protecting the sensitive AZORIAN project from exposure? It was a classic security dilemma—what price to pay for silence.

The lawyers for the government, Thomas J. Scott, Jr., Department of Justice, and (b)(3)(c) OGC, argued that the government should go for broke on this case. It was a winnable one. Furthermore, the case would be held in the U.S. Court of Claims, which had some experience in handling and protecting sensitive information; it routinely hears patent cases in which corporations and individuals must expose priceless proprietary information. Scott (b)(3)(c) felt that the court would issue a

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protective order which would seal the court records and permit the trial to be held *in camera*.

The government agreed to the lawyers' position—the case would go to trial. This meant that the plaintiff, Bascom, and his attorneys would have to be cleared, briefed, and given access to the documentation compiled during AZORIAN. Also the trial judge's law clerk, the clerk of the court, and personnel in the firm providing the court reporting service would have to be cleared. The decision to make an active defense was an important one and was justified fully by events.

The plaintiffs and defendant filed a joint motion for a protective order on 25 March 1976. The trial judge, Francis C. Browne, signed the protective order on 26 March. This order put under seal all documentary evidence presented and all transcripts of the trial proceedings. The court would retain the material under seal, and only a judge of the court could order it to be opened. The proceedings were to be *in camera*. All persons involved were ordered not to disclose any information that was subject to government security regulations. Scott at (b)(3)(c) had been correct—the game would be played under the rules the government had wanted.

The discovery process continued through 1976 and into 1977. A multitude of documents and records were provided from government archives to the plaintiffs. Attorneys for the plaintiffs interviewed government employees who had worked on AZORIAN. There seemed to be a never-ending demand for more records, but finally the attorneys appeared satiated. On 18 January 1977 a pre-trial hearing was held with Judge Browne. Procedures to be used for handling the classified material during the trial were worked out. The Agency would provide a safe for the court's use as well as security officers to courier material to and from the court and to guard the entrance to the court room. Everything was in order for the trial to begin.

The first trial session was held 12 April 1977 and the final one on 2 May 1977. During that time 17 witnesses testified. Six were Agency employees, five of whom were under cover. (b)(1)

(b)(3)(n)

Good security control was maintained by the court and no classified information left the court room.

The plaintiffs were seeking three things. First, they asked for recovery of reasonable and entire compensation for the defendant's alleged infringement of United States Patent 3,215,976. They alleged that the government had infringed the claims of the patent by using the claimed invention upon the *Hughes Glomar Explorer*, which was built in accordance with and used the inventions claimed in the plaintiff's patent. The second thing they sought was recovery of damages for breach of express and implied contract by the government's use of trade secrets and confidential information without compensation of the plaintiff. This charge went back to the proposal given to CIA by Bascom in 1962. Finally, the OSE and Bascom sought recovery of reasonable attorney's fees and court costs.

The basic idea for the patent under contention was conceived by Bascom on Christmas Eve in 1961. At that time he was an employee of the National Science Foundation. His idea was to equip the end of a drill string deployed in the deep ocean with a device for viewing the bottom. The data generated by this equipment would be used to make a bathymetric chart of the ocean floor. From the chart, a search plan could be developed for close inspection, identification and retrieval of objects from the ocean bottom. These ideas were set down on paper and witnessed by Bascom's wife late that Christmas Eve. The patent was filed for in 1962 and issued in 1965.

There were 12 claims to the patent, of which the first was the essential one for the trial. It claimed the method for surveying the ocean bottom from a moving ship whose position was determined from acoustic transponders placed on the ocean floor. The following eight steps were required:

1. Establishing the approximate area of search by known navigational techniques,
2. marking the area with a deep moored transponder,
3. defining the area of search by deploying several more deep-moored transponders,
4. moving the ship in a predetermined manner within the area using the transponders for navigation,
5. making a detailed bathymetric survey of the area with an echo sounder on the surface ship to establish bottom contours,
6. formulating a search plan following the bottom contours at a relatively constant depth,
7. lowering a sensing element on the end of a pipe under the ship near the bottom, and
8. moving the ship about the contours using the search plan to keep the sensing element at a relatively constant distance from the bottom.

All other claims were derived or modified versions of the first one. Expert witnesses for both the plaintiff and the defendant testified that the novel aspect of the Bascom patent was moving the ship with drill string deployed along the predetermined bottom contours in such a manner as to keep the free end of the pipe and sensing element at a relatively constant depth from the ocean floor (steps 6 and 8 above).

The U.S. Government offered several defenses to the plaintiffs' claims of infringement under Count I of their petition. One, obviously, was non-infringement. Others were invalidity of the patent due to prior patents; unpatentability of the claims; non-applicability since the method was on the high seas outside the territorial jurisdiction of the U.S. Patent Law; and finally, since Bascom was a government employee at the time of his discovery, the U.S. Government should have royalty-free use of any patent that he received.

After hearing all the testimony Judge Browne ruled that the patent was valid and that because the ship involved was an American-owned vessel of United States registry, it and acts committed on it were governed by the applicable United States law. He further ruled that although Bascom was employed by the National Science Foundation at the time he had his idea, the work was done on his own time and thus the patent belonged to him. But when Judge Browne ruled on the gut issue of infringement, he found that none of the claims of the Bascom patent were infringed.

(b)(3)(n) therefore, there was no infringement. The plaintiffs' petition was dismissed as to Count I.

The second part of Bascom and OSE's petition alleged that the CIA had caused a breach of express or implied contract. In January 1962 Bascom submitted a proposal to CIA (and also the Air Force and NASA) for the recovery of missile nose cones from the deep ocean floor. The proposal contained information that was commensurate with

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the patent in contention. The proposal also contained reference to the use of the Bascom vessel as a cover for intelligence purposes. The plaintiffs claimed the proposal constituted confidential information which was and remained the exclusive property of Bascom and OSE.

There was no question over the fact that CIA had received a copy of the proposal. It had rejected it (as did the other agencies), citing among various reasons fiscal constraints. Some copies of the proposal had carried the "Proprietary" marking. Also, there was no evidence that any of the agencies receiving the proposal had given it to non-government personnel. The matter in question was whether or not CIA had used the proposal to formulate both the cover and technical basis for the AZORIAN project.

Judge Browne found that Bascom and OSE had lost all claims to confidentiality of the matters disclosed in the proposal when the patent was issued in 1965. Thus, the CIA had not breached an express or implied contract on issue of technology. There was left only the cover concept, not mentioned in the patent, that might be considered as proprietary information.

In this instance, Judge Browne found that Bascom had lost his case for confidentiality through the act of giving the proposal to a number of different agencies. The co-plaintiff, OSE, also was found not to have a case for having devised a proprietary cover. Judge Browne had this to say about cover:

By the very nature of intelligence operations there are many guises or covers which may be utilized in both overt and covert activities. Many such guises have been disclosed in works of fiction as well as true accounts of intelligence operations. To the extent that there may be various types of cover which have not become publicly known, it is unlikely that anyone outside the intelligence community would be apt to come up with a cover concept which was not either obvious to or employed previously by people in the intelligence community. While there is no evidence in the record of this case to establish that defendant was in possession of the cover concept disclosed by Bascom on his own behalf or on behalf of OSE at the time it was first disclosed to defendant, plaintiff has failed to show sufficient novelty in the concept to take seriously plaintiffs' contention as to its value.

It is inferred from the circumstances that OSE included its cover concept in its proposals to defendant's agencies primarily for the purpose of stimulating sufficient interest on the part of such agencies to enter into a contract with OSE to finance its earnest desire to conduct deep ocean research.

I am convinced that defendant's actions to date would have been no different if OSE had never made a proposal to any of defendant's agencies.

The conclusion was that there was no express or implied contract between the plaintiffs and the defendant; therefore, there was no breach of contract. Count II of the petition was dismissed. The trial ended with the petition being dismissed on all counts and no award to plaintiffs of compensation, attorney's fee or court costs.

But the case was not closed. Bascom and his attorneys filed an appeal which meant that the case would be heard by three judges in the Court of Claims. The proceedings continued.

The protective order remained in effect so the records were kept sealed by the court. The appeal hearing would be held *in camera*. During the process leading up to the hearing, the plaintiff filed written objections to the judge's findings as well as additional (or alternative) findings of fact and conclusions of law. The government

replied in writing to each of the plaintiff's filings. After exhausting this procedure, both parties allowed the case to come to trial. The hearing took place on 1 December 1978 (about 18 months after Judge Browne's opinion) before Judges Nichols, Kashiwa and Smith.

The hearing was short. The attorneys could make only very brief (about 30 minutes) oral arguments. The case had to be decided on the established written record. The judges decided the case on 18 January 1979. They upheld Judge Browne with regard to the dismissal of all counts in the plaintiffs' petition—there was no infringement or breach of contract.

As a side note, the judges decided that this case was not the one to test the claims of the government that U.S. patent law did not apply outside the territory of the United States or that because Bascom was a government employee at the time of his conception of the idea, the government should have royalty-free rights to it. The opinions of Judge Browne on both these issues were omitted from the new opinion.

The only appeal left to Bascom was the Supreme Court. Recently, his attorneys have indicated they do not intend to exercise this option. All classified material held by the court has now been returned to CIA. One may hope that the case has ended.

Although this patent suit pointed out one of the many problems a technological project can encounter, it did show that the government can defend itself and still protect highly classified information in civil cases. The Court of Claims was scrupulous in its handling of the sensitive information, as were the attorneys for plaintiff and Bascom himself. Perhaps the intelligence community need not always choose silence over an active defense against a wrongful action. This so-called Bascom case proved the point, at least, for the Court of Claims. It also showed that this court believed cover stories were the private domain of the intelligence community.

Care must be taken, however, against drawing sweeping conclusions about the legal recourses available to the intelligence community. In criminal cases there can be no "closed" trials; the U.S. Constitution guarantees the defendant's right to a public trial. Here the protected use of classified government information can take place only in the judge's chambers and only, of course, if the trial judge consents to the procedure. Furthermore, except when extraordinarily sensitive information is involved, the defense counsel is permitted to take part in these *in camera* proceedings. In short, while each case must be decided on its own, managers should remember that silence is not necessarily the only option.

Will It Ever End?

Although a number of the legal issues have been resolved in the five years subsequent to the AZORIAN recovery operation, there are still two continuing cases under the Freedom of Information Act (FOIA). One is called the Phillippi case and seeks the details of the efforts made by the DCI, William Colby, and any other Agency personnel to persuade members of the news media not to print or broadcast any information relating to the *Glomar Explorer*. The other case is called the Military Audit Project (MAP). In this case, information is being sought on the contractual relationships between the government and Hughes Tool Co., Summa Corporation, and Global Marine, Inc., in particular the financial arrangements with, the sums of money paid to and the profits earned by the corporations involved.

The Phillippi case gets its name from Harriet Ann (Hank) Phillippi, who was a reporter for *Rolling Stone* when she filed her FOIA request on 21 March 1975. Her

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request was turned down by letter on 4 April 1975, and she appealed on 21 April. Again her request was rejected, by a letter dated 21 May 1975 and signed by John Blake as Chairman of the Information Review Committee. The letter reminded Phillippi that she could appeal the decision to a United States district court for a judicial review of her request.

This she did. An attorney for the American Civil Liberties Union represented her. The government presented classified affidavits to the court *in camera*. On the basis of the disclosures in these affidavits, the court on 1 December 1975 ruled in favor of the government's position that it could neither deny nor confirm the existence of any records responsive to Phillippi's request.

The case was appealed to the Court of Appeals for the District of Columbia Circuit which, on 16 November 1976, reversed the decision and remanded the suit to permit further inquiry into the public record of the basis for the government's rejection of the FOIA request. A change in administration had meanwhile changed the posture of "no comment." The DCI, Admiral Turner, and the national security advisor to the President, Dr. Brzezinski, concluded that the Carter administration should disclose the fact that the CIA was involved with the *Explorer* and, on 18 May 1977, the Agency admitted in court that it had attempted to persuade the press to withhold publishing or broadcasting information about the CIA and the *Hughes Glomar Explorer*.

Documents could now be released, but with 10 categories of deletions. By 28 November 1977, 154 documents with deletions were given to Phillippi and her attorney. Arguments continued over the deletions. The Agency gave ground on some; the plaintiffs gave up on others. The documents were reviewed again after the new Executive Order 12065 was issued. The same basic core of deletions was determined to be valid under the new standards.

And that is how the case rests today. The government (the defendants) asked the court on 30 April 1979 to make a summary judgment in favor of the defendants. The ACLU attorney for the plaintiff (Phillippi) was granted a delay. The end is not yet in sight.

The other case was brought by a self-styled public interest group, the Military Audit Project, more commonly called MAP. It has a history very similar to Phillippi's; in fact, the attorneys for the two plaintiffs routinely exchange information on their cases. MAP began in December 1975 with a request by Fritz Cohen for information on the contractual arrangements, dollars involved, and corporate profits related to the *Hughes Glomar Explorer*. Later, the request was expanded to include any audits of the project. The latter request stemmed directly from a document released in the Phillippi case.

After denying the requests, the government was taken to court by MAP in the U.S. District Court for the District of Columbia. Again classified affidavits were filed by the government, and again, the court on 20 October 1976 ruled in favor of the government. The court stated the documents were properly withheld under Executive Order 11652. As with Phillippi, the case was appealed to the Court of Appeals.

After the Administration's decision to abandon the "no comment" posture on the CIA-*Hughes Glomar Explorer* relationship, the government filed an unopposed motion to remand the case to the trial court and withdrew its insistence that it could neither confirm nor deny existence of any pertinent records. On 16 June 1977 the Court of Appeals vacated the dismissal order granted by the lower court in October, and the case was remanded to the District Court for further proceedings.

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The government released approximately 2000 pages of documents with 13 categories of deletions. In the spring of 1978 the government filed affidavits from Secretary of State Vance, DCI Turner, and Messrs. Tom Yale and Ernest Zellmer of CIA explaining the nature of the deletions and the justification therefor. The deletions were once more examined in early 1979 in light of the new Executive Order 12065 and found to be valid. Another affidavit was filed by Mr. Zellmer stating the findings under E.O. 12065.

In July 1978 the government had tried a different tactic. It had offered to give the plaintiff (MAP) the shipyard cost of the ship, the outfitting cost, the fee received by Global Marine, the total cost including fixed fee of the pipe string provided by Hughes Tool Co., and the total cost with fixed fee paid to Summa Corporation. For this MAP would agree to dismissal of the case with prejudice, and they together with their attorneys would agree not to bring another FOIA suit in regard to the project. The government's compromise was rejected.

On 20 April 1979 the government filed a motion for summary judgment in favor of the defendant (the government). MAP countered by dismissing its attorney and requesting a delay. The delay has been granted.

Will it ever end?

Moral

One may wonder why anyone would want to undertake to manage a large covert technical program considering the pressures of the job and the potential for being submerged in an endless morass of legal issues. Ogden Nash has furnished a reason why:

The moral is that it is probably better not to sin at all, but if some kind of sin you must be pursuing,

Well, remember to do it by doing rather than by not doing.*

*From "Portrait of the Artist as a Prematurely Old Man," by Ogden Nash.

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